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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1192

DONALD GOLDSTEIN, RUTH KOVEN and DONALD KOVEN,
Petitioners,

Against

THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Appellate Department, Superior Court of California, County of Los Angeles

BRIEF

Of the Attorney General of the State of Tennessee, *Amicus Curiae*, in Support of the California Penal Code Provision §653H Which Protects Property Rights of Citizens From Traffic in Illicit and Contraband Property

A. INTEREST OF THE *AMICUS CURIAE*

The Attorney General of the State of Tennessee files, *amicus curiae*, this brief in support of a permissible exercise of the police power of the states. The State of Tennessee has enacted a statute (Tenn. Code Ann. § 39-4244 to 4250) which is similar to the California Penal Code section (§ 653H) under attack in the instant case. A copy of the Tennessee statute is appended hereto as Appendix "I". Thus the State of Tennessee has direct concern in upholding the validity of the challenged statute of the State of California.

B. ARGUMENT

Tennessee urges that the California statute be upheld as a proper exercise of state police power. Tennessee is aware of the other *amicus curiae* briefs filed in this cause, as well as the brief of the respondent. Because of the number of briefs heretofore filed, and because those briefs very capably advance the important issues presented, Tennessee will join in the arguments set forth in favor of the respondent in those briefs and not burden this Court with an additional extended brief.

It is significant, however, that Tennessee and a number of other states have each independently assessed the business practices of the record duplicators and enacted laws similar to California's statute outlawing such conduct. The appropriation and sale of recorded performances from tapes and phonograph records by persons who neither sought nor obtained permission from the original artists or manufacturers deceives the consuming public and deprives legitimate record producers and the artists whose performances are appropriated of their due compensation for their investment of money, time and artistry. It is urged that states possess the power to protect their citizens from such practices through the enactment of legislation similar to that enacted by the California Legislature.

C. CONCLUSION

The *amicus curiae* respectfully submits that California's penal statute is aimed simply at the prevention of theft of personal property in the form of performances on records and tapes. Since statutes such as that enacted by the California Legislature compliment rather than conflict with the federal policy of fairness in the competitive system

and protect the legitimate property rights of its citizens, the California statute should be upheld and the judgment below affirmed.

Respectfully submitted

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Certificate of Service

I, David M. Pack, Attorney General of the State of Tennessee and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of September, 1972, copies of the foregoing Brief of the Attorney General of the State of Tennessee, *Amicus Curiae*, were mailed to:

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APPENDIX "I"

39-4244. Recorded devices—Unauthorized reproduction or sale—"Ownership" defined.—As used in §§ 39-4244—39-4250, unless the context requires otherwise, "owner" means the person who owns the master phonograph record, master disc, master tape, master film or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films or other articles on which sound is recorded and from which the transferred sounds are directly or indirectly derived. [Acts 1971, ch. 166, § 1.]

39-4245. Recorded devices—Transfer of sound or manufacture or distribution without consent of owner—Felony —Exception.—It is a felony for any person to

(a) Knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with the intent to sell or cause to be sold, or to be used for profit through public performance, such article on which sounds are so transferred, without consent of the owner; or

(b) Manufacture, distribute or wholesale any article with the knowledge that the sounds are so transferred, without consent of the owner.

(c) This section does not apply to any person engaged in radio or television broadcasting who transfers, or causes to be transferred, any such sounds other than from the sound track of a motion picture intended for, or in connection with broadcast or telecast transmission or related uses, or for archival purposes. [Acts 1971, ch. 166, § 2.]

39-4246. Recorded devices—Retailing recorded device unlawfully—Misdemeanor.—It is a misdemeanor for any person to knowingly retail or possess for the purpose of

retailing any recorded device that has been produced, manufactured, distributed, or acquired at wholesale in violation of any provision of §§ 39-4244–39-4250. [Acts 1971, ch. 166, § 3.]

39-4247. Recorded devices—Manufacturer's name on package.—Effective September 29, 1971, every recorded device sold or transferred or possessed for the purpose of sale by any manufacturer, distributor, or wholesale or retail merchant shall contain on its packaging the true name of the manufacturer; provided, however, that the term "manufacturer" shall not include the manufacturer of the cartridge or casing itself. [Acts 1971, ch. 166, § 4.]

39-4248. Confiscation of unauthorized recorded devices —Disposition.—Effective September 29, 1971, it shall be the duty of the sheriff of each county, member of the Tennessee highway patrol, and Tennessee bureau of criminal identification, upon discovery, to confiscate all recorded devices that do not conform to the provisions of § 39-4247, and he shall deliver the nonconforming recorded devices to the district attorney-general of the judicial district in which the confiscation was made. The district attorney-general by court order shall give the same to a charitable institution or other worthwhile organization. The provisions of this section shall apply to any nonconforming recorded device, regardless of the requirement in § 39-4246, of knowledge or intent of a retail seller. [Acts 1971, ch. 166, § 5; modified.]

39-4249. Recorded devices—Penalty for improper sale or manufacture.—Each and every individual manufacture, distribution, or sale or transfer at wholesale of such recorded devices in contravention of the provisions of §§ 39-4244–39-4250 constitutes a separate offense punishable by imprisonment not less than one (1) year, nor more than three (3) years, or by fine of not more than twenty-

five thousand ($25,000) dollars for the first offense; and by imprisonment not less than three (3) years, nor more than ten (10) years, or by fine not more than one hundred thousand ($100,000) dollars, or both for any subsequent offense. [Acts 1971, ch. 166, § 6.]

39-4250. Recorded devices—Civil action for damages.—(a) Any owner of a recorded device, as set forth in §§ 39-4244–39-4250, whose work is allegedly the subject of a violation of the provisions of § 39-4245 shall have a cause of action in the circuit courts of this state for all damages resultant therefrom, including actual, compensatory, incidental, and punitive damages not less than three (3) times the amount of the total cost of producing the recorded device.

(b) Any lawful producer of a recorded device, as set forth in §§ 39-4244–39-4250, whose product is allegedly the subject of a violation of the provisions of § 39-4245 shall have a cause of action in the circuit courts of this state for all damages resultant therefrom, including actual compensatory, incidental, and punitive damages not exceeding three (3) times the amount of the total cost of producing the recorded device. [Acts 1971, ch. 166, § 7.]

Effective Date, Acts 1971, ch. 166, § 8.

July 1, 1971.